OAH Docket No. 9-1901-8651-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner
Commissioner of Labor and Industry,
State of Minnesota,
Complainant,

v.

ORDER ON MOTION FOR DAMAGES AND ATTORNEYS FEES

Conrad Peterson, Janice Peterson,
Derrick Peterson, and Tracy Peterson,
d/b/a Gopher Tackle,
Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge on Complainant's motion for damages and attorneys fees. This motion was filed on March 19, 1996. Respondent filed a memorandum in opposition to the motion on April 3, 1996, at which time the record closed.

Mark W. Traynor, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101, represented the Complainant. Patricia M. Krueger, Borden, Steinbauer & Krueger, P.A., 302 South Sixth Street, P.O. Box 411, Brainerd, Minnesota 56401 represented the Respondent.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That Complainant's motion for damages is GRANTED, as follows:

a) Respondents Conrad and Darrick Peterson shall pay Charging Party Laurie Turner damages consisting of backpay and job search expenses in the amount of $8,753.71.

b) Respondents Conrad and Darrick Peterson shall pay Charging Party Jeff Thomas damages consisting of backpay and job search expenses in the amount of $5,784.80.

2. That Complainant's motion for attorneys fees is GRANTED, and Respondents Conrad and Darrick Peterson shall pay to the Commissioner of the Minnesota Department of Labor and Industry $23,019.15, as attorneys fees and costs in this matter.

Dated this _____ day of May, 1996

PHYLLIS A. REHA

Administrative Law Judge

MEMORANDUM

This matter came before Administrative Law Judge Jon L. Lunde, who issued Findings of Fact, Conclusions of Law and Order (First Order) on October 11, 1994. Judge Lunde issued an Order on Applications for Expenses and Attorneys Fees (Second Order) on December 23, 1994. The First Order found that the two charging parties, Laurie Turner and Jeffrey Thomas, were denied wage increases as a result of their participation in activities protected under the Minnesota Occupational Safety and Health Act (Minn. Stat. § 182.669, hereinafter "MOSHA"). However, Judge Lunde found that neither charging party had been discharged as a result of their participation in conduct protected by MOSHA. Respondents were ordered to pay Turner $67.56 for raises improperly denied. Respondents were ordered to pay Thomas $84.80 for raises improperly denied. The remaining charges were dismissed.

After the resolution of the MOSHA issues, Complainant and Respondents Janice and Tracy Peterson requested attorneys fees. Complainant requested $16,860 for attorneys fees and $11,881.29 in investigation expenses. In the Second Order, Judge Lunde found that the Petersons failed to show that they met the restrictive definition of "party" in the Minnesota Equal Access to Justice Act (Minn. Stat. § 15.472, hereinafter "MEAJA"). Complainant's claim for attorneys fees arises from MOSHA, not the MEAJA. Judge Lunde found that the Complainant's hourly attorney fee and number of hours worked were reasonable. The total attorney fees awarded to Complainant were $3,739.89, which amounts to approximately twenty percent of the amount requested by Complainant. The reduction in fees was based upon the fact that Complainant prevailed in only one issue of its original charge against Respondents. The request for investigatory expenses was denied as not statutorily authorized under MOSHA.

Complainant appealed the decisions of Judge Lunde to the Occupational Safety and Health Review Board (OSHRB). The OSHRB upheld the findings of retaliation on the denial of raises but reversed the findings that Turner and Thomas were not improperly discharged. The OSHRB remanded this matter for further proceedings consistent with its Order.

Upon remand, Complainant has moved for an amendment of the damage award for Turner, the damage award for Thomas, and the attorneys fee award. Respondents assert that the damage awards for Thomas and Turner should not be modified from the amount awarded by Judge Lunde, since both employees would have been laid off from their employment on the same separation date, due to a lack of work. Respondents argue that awards for raises not given, or overtime pay not required would be improper because such awards would be based upon speculation, not supported by evidence in the record. Respondents further argue that any damage award for backpay should be offset by unemployment compensation and other benefits received by Turner and Thomas. The degree of mitigation of damages by the two employees is also cited by Respondents as a basis for reducing any backpay award. The expenses claimed by the employees for their job search following termination is criticized by Respondents as excessive and unrelated to the termination. Finally, Respondents assert that the attorneys fees requested by Complainant, totaling $19,315.14, should be denied as unreasonable in light of the results obtained in this case.

As found by Judge Lunde, Turner and Thomas were denied raises due to their participation in MOSHA protected activities. Therefore, the proper hourly rate for Thomas was determined to be $5.00. By the same rationale, the proper hourly rate for Turner was found to be $5.50. Now that the OSHRB has determined that both employees were also improperly discharged, these rates are the proper starting points for the calculation of each employee's backpay award. The discharges occurred on March 30, 1993. The backpay calculation for each employee should therefore begin on March 31, 1993.

Thomas found employment with a steam cleaning business for two weeks in 1993 and earned approximately $200.00. Thomas was not retained by the steam cleaning business when it was sold. On March 15, 1994, Thomas began working at the Minnesota Conservation Corps (MCC), a program operated under the authority of the Department of Natural Resources. Thomas worked a forty-hour week at MCC at the rate of $4.25 per hour.

By the date of the hearing in this matter, Turner had not yet found other employment. Turner received unemployment compensation in the approximate amount of $100.00 per week for thirty-three weeks. Turner also received Aid to Families with Dependent Children (AFDC), but the benefit amount is not included in the record of this matter. Turner claims as damages: 1) the lost wages resulting from the denied raise prior to discharge totaling $37.15; and, 2) the lost wages to the date of the hearing totaling $15,941.75. The lost wages assume a raise on January 1, 1994 of 25 cents per hour and overtime hours of three hours per week through the date of the hearing. Additionally, Turner claims damages of $24.31 for telephone calls, $40.00 for photocopy costs, and $591.84 for mileage, all expended in job search efforts.

Respondents assert that Berkley, their largest single customer, informed them that their products would no longer be ordered due to less than anticipated demand for the products. This information was given to Respondents in mid-March. At that time Berkley owed Respondents about $60,000. In early April, Berkley paid that amount owed. Respondents claim that its business had seriously declined by June, 1993, and neither Turner nor Thomas would have been employed by Respondents past June 24, 1993. By that date, Respondents claim that, except for its owners and their immediate families, all but one part-time employee had quit or had been laid off.

An employer can assert that back pay damages should be limited since the employee would not have remained employed for legitimate business purposes. In making such an argument, the employer bears the burden of proving that the employment relationship would have legitimately ended by clear and convincing evidence. Lynn Martin, Secretary of Labor v. Anslinger, Inc., 1992 OSHD 29,720 (U.S.D.C. S.D. Tex. 1992) (citing Valdez v. Church's Fried Chicken, Inc., 683 F.Supp. 596, 636 (W.D. Tex. 1988)).

The evidence adduced concerning the business slowdown shows that some of the employees considered by the employer to have been "laid off", left on their own accord. Transcript, Volume II, at 356-357. Conrad Peterson was unsure of how many employees were actually laid off, but did know that one employee (other than the four Peterson family members) was kept on part-time throughout the summer. No business records relating to accounts receivable or to profits and losses were offered to show how the business fared over the year after the termination of Thomas and Turner.

The standard for uncertain evidence in back pay awards is stated in Anslinger:

> Because the defendant's unlawful conduct has created the necessity for a back pay award, any "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party." Hairston v. McLean Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975)(quoting Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1380 n. 53 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-61 (5th Cir. 1974).

Anslinger, at 40,370.

Resolving the uncertainties against the employer, the evidence in the record supports a back pay award of full-time wages for Turner for the period from March 31, 1993, to June 2, 1993; and half-time wages for the period from June 2, 1993, to the date of the evidentiary hearing in this matter. For Thomas, the award should be for full-time work from March 31, 1993, to June 2, 1993; and half time wages for the period from June 3, 1993, to March 14, 1994. Since the Respondents completely control all facets of the business, including who continues to work and how work is distributed, there is ample support in the record to support the conclusion that Respondents could have structured the workplace to provide half-time employment for Turner and Thomas, consistent with the level of business experienced by Respondents. There is evidence that there certainly might have been a slow-down of business for Respondents, but there is insufficient evidence to conclude that business necessity required that Thomas and Turner be laid-off, absent the discriminatory motive prohibited by MOSHA.

Respondents have failed to prove that layoffs would have occurred due to a business slow-down, therefore, damages beyond June 3, 1993 are appropriate.

The Department has requested that back pay be awarded to the date of the motion to set damages; or, to the date at which time the employees earned more in wages from subsequent employment to completely mitigate their damages. Respondents maintain that the damages cannot be awarded past the hearing date in this matter. There are circumstances where posthearing wage awards (frontpay) can be awarded. The harm suffered by the employees in this matter can be adequately remedied by an award of backpay. There are no circumstances present here to justify an award of frontpay.

Mitigation of damages is a principle applied to damage awards, whereby the party suffering damages is expected to act reasonably to reduce the damages experienced. Respondents assert that the employees' backpay awards should be reduced because they failed to conduct a good faith job search sufficient to mitigate their damages. The evidence in the record shows that both employees engaged in thorough job search activities. The employees did not fail to mitigate their damages. A reduction in damages for failure to mitigate damages is not warranted in this case.

Respondents maintain that any damage calculation must include a deduction for unemployment compensation benefits received by Turner and Thomas. The Respondents cite Commissioner v. International Bildrite, Inc., OAH No. 69-1901-8180-2 (Findings of Fact, Conclusions of Law and Order issued January 4, 1994), in support of its argument that unemployment compensation benefits are deductible from a backpay award. The Department acknowledges the holding in International Bildrite, but points out that the Eighth Circuit Court of Appeals has changed the treatment of unemployment compensation benefits in back pay awards. In Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1113 (8th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3067 (U.S. July 19, 1994) the Court stated:

> B. The Cross-Appeal: Unemployment Compensation
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> The district court deducted $12,101.00 Gaworski received in unemployment compensation after his termination because, in the court's view, "[t]o allow Gaworski to receive unemployment compensation as well as the back pay would provide double recovery." We reverse.
>
> It is fundamental that "an employer can not set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source, such as insurance or compensation or benefits under a Workmen's Compensation Act, even where the defendant has contributed to the fund." *Chicago Great W. Ry. v. Peeler*, 140 F.2d 865, 868 (8th Cir.1944). This "collateral source rule" has a long pedigree, but it remains applicable and gains in significance in the context of employment discrimination claims. As we noted in *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir.1991), because of the collateral source rule, " '[m]ost courts have refused to deduct such benefits as social security and unemployment compensation from ADEA awards,' " id. at 1355 n. 11 (quoting *Guthrie v. J.C.*

Penney Co , 803 F.2d 202, 209 (5th Cir.1986)). Such a refusal is sensible and in accordance with the purposes of the ADEA.

Backpay awards in discrimination cases serve two functions: they make victimized employees whole for the injuries suffered as a result of the past discrimination, and they deter future discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975); see *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir.1982) (noting that ADEA remedies aim "to eliminate the unlawful practices and to restore aggrieved persons to the position where they would have been if the illegal discrimination had not occurred"). The Supreme Court in Albemarle emphasized the importance of the deterrence function, saying:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self- evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

422 U.S. at 417-18, 95 S.Ct. at 2371-72 (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir.1973)). [FN8] Reducing a backpay award by unemployment benefits paid to the employee, not by the employer, but by a state agency, *see NLRB v. Gullett Gin Co.,* 340 U.S. 361, 364, 71 S.Ct. 337, 339, 95 L.Ed. 337 (1951), makes it less costly for the employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a backpay award. *See Craig v. Y & Y Snacks, Inc.* , 721 F.2d 77, 84 (3d Cir.1983); *E.E.O.C. v. Ford Motor Co.* , 645 F.2d 183, 196 (4th Cir.1981), *rev'd & remanded on other grounds*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982). Indeed, it leads to a windfall to the employer who committed the illegal discrimination. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1429 (7th Cir.1986); *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 626 (10th Cir.1980). By virtue of state aid provided "to carry out a policy of social betterment for the benefit of the entire state," and not "to discharge any liability or obligation" of the employer, *Gullett Gin*, 340 U.S. at 364, 71 S.Ct. at 339, the employer winds up paying less to the employee than it would have had it not illegally terminated him. [FN9]

Based on these considerations, no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases. Circuits have split, however, over whether deducting unemployment benefits should be prohibited or should be left to the discretion of the trial court. The majority have held that, as a matter of law, unemployment benefits should not be deducted from backpay awards. *See Craig*, 721 F.2d at 85; *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 627-28 (6th Cir.1983), cert. denied, 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984); *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346-47 (9th Cir.1982) (per curiam); *E.E.O.C. v. Ford Motor Co.*, 645 F.2d 183, 196 (4th Cir.1981), *rev'd & remanded on other grounds*, 458 U.S. 219, 102 S.Ct. 3057, 73

L.Ed.2d 721 (1982), *original position adhered to on remand*, 688 F.2d 951, 952 (4th Cir.1982) (per curiam); *Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549, 1550-51 (11th Cir.1983) (en banc) (per curiam). Three circuits have adopted a minority position that deducting unemployment benefits lies within the discretion of the trial court. *See Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1555 (10th Cir.1988); *Hunter*, 797 F.2d at 1429 (Posner, J., acknowledging discretion as Seventh Circuit rule but stating that it "may be unduly favorable to defendants"); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir.1977). The Second Circuit has in the past affirmed a deduction of unemployment benefits as discretionary, *see E.E.O.C. v. Enterprise Assoc. Steamfitters Local 638 of U.A.*, 542 F.2d 579, 592 (2d Cir.1976), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977), but more recently indicated that the circuit's rule remains unsettled, *see Promisel v. First Am. Artificial Flowers*, 943 F.2d 251, 258 (2d Cir.1991), *cert. denied*, --- U.S. ----, 112 S.Ct. 939, 117 L.Ed.2d 110 (1992).

Because we believe the majority rule is the more sound position, we hold that unemployment benefits should not be deducted from awards of backpay under the ADEA. Unemployment benefits are collateral source payments that cannot be termed even "partial consideration" for employment. *Gullett Gin*, 340 U.S. at 364, 71 S.Ct. at 339. We believe that no employer should benefit because of the state's beneficence in providing for one of the employer's illegally discharged employees. If Gaworski's award is to be reduced, it should be the state that seeks to recoup the benefits it paid out. [FN10] Accordingly, we reverse this aspect of the district court's decision and find that Gaworski's backpay award should be increased by $12,101.00.

FN8. *Albemarle* was a Title VII case, but these principles apply more strongly to cases under the ADEA. Although the goal of both statutes is to eliminate discrimination in the workplace, backpay is discretionary under Title VII, while it is mandatory under the ADEA--and thus a more fundamental part of the remedial scheme. *See Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978); *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 217 (3d Cir.1984), *vacated & remanded on other grounds*, 469 U.S. 1202, 105 S.Ct. 1159, 84 L.Ed.2d 312 (1985).

FN9. Absent "willful" violations, which lead to an award of liquidated damages, awards under the ADEA are not punitive in nature. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-28, 105 S.Ct. 613, 623- 25, 83 L.Ed.2d 523 (1985); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723 (8th Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992).

FN10. We note that Minnesota, Gaworski's domicile, appears to have a procedure in place for handling backpay awards covering certain periods for which unemployment compensation was paid. See Minn.Stat. §268.08 Subd. 3a, 268.18 Subd. 1 (1992).

The Eight Circuit's holding regarding ADEA matters is clear. Any backpay award under that statute is subject to state law on unemployment compensation awards and should not be otherwise reduced by benefits from collateral sources. Unemployment compensation is identified as a collateral source. One purpose of the damage provisions of the ADEA, to deter discrimination based on age, is similar a purpose of MOSHA, to deter discrimination based on workplace safety complaints. There is no indication in the International Bildrite matter that the effect of Minn. Stat. § 268.08 was considered in making the backpay award. The treatment of unemployment compensation benefits in backpay awards under ADEA is equally appropriate under MOSHA. No reduction to the backpay award for unemployment compensation benefits is appropriate. The only adjustment to the backpay award will occur by operation of Minn. Stat. § 268.08 and that statute is beyond the jurisdiction of this matter.

Similar to Respondents' argument on unemployment compensation, the receipt of Aid to Families with Dependent Children (AFDC) benefits is identified as another amount received in mitigation of lost earnings which should reduce any backpay award to Turner. Taking that argument one step further, Respondents maintain that the failure to identify the amount of AFDC received results in the inability of Turner to demonstrate what damages she actually suffered and thus, no backpay can be awarded. The analysis in Gaworski, identifying such benefits as collateral sources not to be deducted from backpay awards, also applies in this case. There is no difficulty in identifying the total backpay to be awarded in this matter.

For Thomas, the backpay award is calculated as follows: nine weeks times 40 hours times $5.00 per hour equals $1,800.00 (9 weeks X 40 hours X $5.00 = $1,800.00);and, 41 weeks times 20 hours times $5.00 per hour equals $4,100.00 (41 weeks X 20 hours X $5.00 = $4,100.00). The expenses identified by Thomas for job search efforts were not identified separately from expenses for medical care. Adding some portion of those expenses to the damage award is speculative. No such expenses can be added to the damage award. The amount awarded by Judge Lunde for the denied raise, $84.80, should be added to the total. The $200.00 earned in mitigation should be deducted from the backpay calculated resulting in a final total of **$5,784.80**. Since the Judge has found that Thomas would have been working half-time for Respondents, there is no adjustment to be made for the lower hourly rate Thomas earned from MCC in full-time employment.

For Turner, the backpay award is calculated as nine weeks by 40 hours by $5.50 per hour equals $1,980.00 (9 weeks X 40 hours X $5.50 = $1,980.00); and, 55 weeks by 20 hours by $5.50 per hour equals $6,050.00 (55 weeks X 20 hours X $5.50 = $6,050.00). Turner's expenses of $656.15 in seeking a job after her discharge are reasonable and should be added to the damage award. Judge Lunde's award of $67.56 for the denied raise should be added to arrive at the total of **$8,753.71**.

The backpay awards to Turner and Thomas are not to be offset by either unemployment compensation benefits or AFDC received by the employees. Any repayment of unemployment compensation benefits will be governed by Minn. Stat. § 268.08.

As to attorney's fees, Judge Lunde found the attorney's fees claimed by the Department to be reasonable, subject to an 80% reduction for the outcome of the case. Judge Lunde also applied the 80% reduction to the allowable expenses. With the partial reversal of the Judge Lunde's decision by OSHRB, the reason for the reduction is gone. The requested attorney's fees of $16,860.00 are granted. The originally requested expenses included the cost of the services of the Office of Administrative Hearings which were billed to the Department. Those costs, and the minimal costs of investigatory depositions were held to be not recoverable. Judge Lunde held the recoverable costs of the Department to be $1,839.45. Second Order, at 10. The entire amount of the costs found recoverable by Judge Lunde is appropriately awarded to the Department, without reduction for outcome.

The Department has requested an additional $4,319,70 for posthearing attorneys fees. The hours expended are 84.7 at a rate of $51.00 per hour. These are reasonable amounts given the number and complexity of the issues raised by Respondents. The additional attorneys fees should be awarded. The total attorneys fees and expenses awarded is $**23,019.15**. While this amount exceeds the damages awarded to the Complainants, The Judge recognizes that the public interest requires the Department to pursue and prosecute charges of discrimination and retaliation brought as a result of employees' participation in MOSHA investigations. The attorney fees awarded are justified.

P.A.R.